this case shows that the said sum of $8,850.00 was found on those 33 persons but there is no evidence to show that the said sum of money had been used in or for the purpose of playing the game of "blangkas" and could not therefore be declared by the Court before which the conviction is had to be forfeited to the Government. (See *Teoh Ah Pow* v. *Public Prosecutor*(1) and *Hoo Kung Hock* v. *Public Prosecutor*(2)).

For these reasons, the order of forfeiture of the said sum of $8,850.00 must be set aside and I also ordered that the money be refunded to the persons from whom it was taken by the police.

Order of forfeiture set aside.

TAIB BIN AWANG v. MOHAMAD BIN ABDULLAH & ORS.

[O.C.J. (Eusoff Chin J.) June 18 & 19; & August 23, 1983]

[Kuala Trengganu – Civil Suit No. 94 of 1982]

Practice & Procedure – Claim for wrongful and malicious prosecution in Kadi's court – Case in Kadi's court under appeal – Action brought prematurely – Statement of Claim disclosed no reasonable cause of action and ordered to be struck out.

Tort – Malicious prosecution – Factors to be proved – Statement of Claim did not disclose prosecution ended in plaintiff's favour.

The plaintiff in this case claimed against the 3 defendants on the grounds that he had been wrongfully prosecuted in the Kadi's Court for an offence under the Administration of Islamic Law Enactment, Trengganu, 1955, section 149. The plaintiff was found guilty and was sentenced to 2 weeks' imprisonment. The case in the Kadi's court was still under appeal.

Held, dismissing the plaintiff's claim: (1) in an action for malicious prosecution it is essential for the plaintiff to aver and prove that the proceeding complained of, terminated in his favour;

(2) since the criminal proceedings against the plaintiff in the Kadi's court had not been finally determined by the Syariah Appeal Court in the plaintiff's favour, it was premature for the plaintiff to bring this action;

(3) the plaintiff's Statement of Claim disclosed no reasonable cause of action against the 3 defendants and ought to be struck off.

Cases referred to:

(1) *Everett* v. *Ribbands & Anor.* [1952] 2 Q.B. 198.

(2) *Bynoe* v. *Bank of England* [1902] 1 K.B. 467

(3) *Basebe* v. *Matthews and Wife* (1867) L.R. 2 C.P. 684.

CIVIL SUIT.

Wan Abdul Muttalib bin Embong for the plaintiff.

Abdul Aziz bin Mohamed (State Legal Adviser) for defendants.

Cur. Adv. Vult.

Eusoff Chin J.: The plaintiff claims damages against the three defendants on the grounds that he had been wrongfully and maliciously prosecuted in the Kadi's Court for an offence under section 149, Administration of Islamic Law Enactment, Trengganu, 1955 (hereinafter referred to as the Enactment). In the Kadi's Court, the plaintiff was charged vide K.T. Kes Jenayah No. 108/81 as follows:–

"Bahawa kamu Taib bin Awang K/P No. 1713960 pada 31.7.1981 antara jam 12.40 hingga 1.15 petang telah mengeji Pejabat Hal Ehwal Ugama Trengganu dengan bertindak sebagai Imam mendirikan Sembahyang Jumaat di Surau Pintu Gerbang Chendering, Kuala Trengganu sedangkan pada 2.5.1981 Pejabat Hal Ehwal Ugama Trengganu telah mengeluarkan satu surat sibaran Bil. (10) dalam PU.Tr.15/1/133, telah disibarkan kepada penduduk-penduduk Chendering dan satu salinan telah ditampalkan di Surau tersebut menegah siapa-siapa mendirikan Sembahyang Juma'at di Surau tersebut. Oleh yang demikian kamu ditudoh telah melakukan satu kesalahan di bawah fasal 149 Undang-Undang Pentadbiran Hukum Syarak Bil. 4/55 Trengganu dan boleh dihukum di bawah fasal yang sama."

The Statement of Claim, however, does not disclose whether or not the plaintiff was found guilty of the charge and if so what sentence was passed on him, or whether he was acquitted by the Kadi's Court. But in the course of argument, the plaintiff's counsel admitted that the plaintiff was found guilty and was sentenced to two weeks' imprisonment, and that the case in the Kadi's Court was still under appeal.

The first defendant, Mohamad bin Abdullah, is an investigating officer, and the second defendant is a prosecutor, both of the Religious Affairs Department Trengganu. The third defendant is the State Commissioner of that Department.

It is claimed by the plaintiff that the third defendant had issued a circular on 2.5.81 prohibiting the performance of Friday prayer at Surau

Chendering Pintu Gerbang. The plaintiff claims that Surau Chendering Pintu Gerbang is not the mosque where plaintiff was the imam (leader) at the Friday prayer on 31.7.81, as this mosque was gazetted as a mosque vide PTG. (78) dlm. CLM. 166/53. On that day, 31.7.81, the first defendant and his companions were at the mosque in the congregation performing the Friday prayer led by plaintiff, and therefore had committed the same offence but were not charged in the Kadi's Court. On the next day 1.8.81, first defendant lodged a report to the Syariah Court, Kuala Trengganu, to the effect that the plaintiff had led a Friday prayer at Surau Pintu Gerbang Chendering, which resulted in the prosecution of the plaintiff.

Plaintiff, therefore, alleges that the first defendant had lodged a false report against him, and acting on that report, the second defendant had wrongfully and maliciously prosecuted the plaintiff. As against the third defendant, the plaintiff alleges that the third defendant had no authority to issue the circular, and to prohibit the plaintiff from performing Friday prayer at the said mosque since the place was the authorised and gazetted mosque, and, therefore, the mosque recognised by the Sultan. Plaintiff claims that the third defendant's circular had made it unlawful for Friday prayer to be held at that mosque. As the result of the defendant's malicious and wrongful prosecution of the plaintiff, the plaintiff has suffered damages and injury to his reputation and standing, and has been put to public contempt.

The plaintiff prays for the following orders:–

i) A declaration that the Administration of Islamic Law Enactment, State of Trengganu No. 4 of 1955 be declared void and of no effect. (Withdrawn by plaintiff's counsel in Court)

ii) A declaration that the 3rd defendant has no right to give a name "Surau Pintu Gerbang Chendering" to Masjid Besar Chendering which was lawfully gazetted as such.

iii) A declaration that the building standing on Lot 261 KSB 549 Mukim Chendering is a lawful Mosque and use for the purpose it was gazetted.

iv) A declaration that the prosecution of the Plaintiff was wrong in Law.

v) The Defendants pay damages to the Plaintiff.

vi) Costs.

vii) Any other order the court shall deem fit.

The State of Legal Adviser, for the three defendants, filed Summons-in-Chambers seeking an order that the Plaintiff's action be struck out under Order 18, rule 19(1)(a) and (b), of the Rules of the High Court, 1980.

In the course of arguments, the plaintiff's counsel withdrew paragraph 16 and prayer number (i) in the plaintiff's Statement of Claim. He also confirmed that the plaintiff was convicted by the Kadi's Court, and sentenced to two weeks' imprisonment and that the sentence is still under appeal.

The State Legal Adviser said in argument that the first defendant only lodged a report, under section 39 of the Enactment which states:–

"39(1) An information with a view to prosecution shall be made in writing or orally to the presiding officer of the Court. If made orally, it shall be reduced to writing by him. In either event, he shall require the informant to affirm to the truth of such information.

(2) The Court may refuse to take any such action on such information if not satisfied that there is reason to believe that an offence had been committed."

The second defendant was the person who had conducted the prosecution which resulted in the plaintiff's conviction.

The State Legal Adviser contended that since the prosecution of the plaintiff ended in his conviction, the plaintiff had no cause of action for malicious prosecution against the defendants.

Counsel for the plaintiff had submitted at length alleging that the Mufti's circular did not say which of the mosques at Kampong Chendering was the lawful mosque. He contended that the lawful mosque was the one in which the plaintiff had led the Friday prayer. The Majlis Ugama Islam had made a mistake by recognising the wrong mosque. There was malice on the part of the defendants as out of about 250 people performing prayer at that mosque with plaintiff, only the plaintiff was prosecuted. He also alleged that the Kadi who tried the plaintiff, did not understand the English language and had to depend on the translated version of the Enactment; and that the translation was wrong and faulty.

Going through the allegations in the Statement of Claim of the plaintiff, I find that the plaintiff is claiming damages for having been maliciously prosecuted by the defendants, (paragraphs 9 and 14 of the Statement of Claim). The Statement of Claim does not, however disclose whether the prosecution resulted in the plaintiff's acquittal or conviction. But counsel for both plaintiff and defendants agreed in Court that the prosecution resulted

in the plaintiff's conviction and that the plaintiff was sentenced to two weeks' imprisonment by the Kadi's Court; and further that the conviction was still under appeal when this application came up for hearing before me.

In an action for malicious prosecution, the plaintiff must prove that –

(a) the defendants prosecuted him;

(b) the prosecution ended in the plaintiff's favour;

(c) that the prosecution lacked reasonable and probable cause; and

(d) that the defendant acted maliciously.

The Statement of Claim does not disclose that the prosecution of the plaintiff ended in his favour. Indeed the plaintiff's counsel admitted that it ended in plaintiff's conviction and sentence. His conviction is still under appeal.

In *Everett* v. *Ribbands & Anor.*,[1] it was held that in an action for malicious prosecution it is essential for the plaintiff to aver and prove that the proceeding complained of, terminated in his favour. Somervell L.J. at page 202, quoted a passage of the judgment of Crompton J. in *Bynoe* v. *Bank of England*[2] which was confirmed by the Court of Appeal which is –

"There is no doubt, on principle, and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage ... But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such a termination. The reason seems to be that, if in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principle on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause."

In *Basebe* v. *Matthews and Wife*,[3] Byles, J. said at page 687:

"I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgment it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of *Vanderberg* v. *Blake* (Hardr. 194), where Hale, C.J., says, that, 'if such an action should be allowed,' – that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper court, – "the judgment would be blown off by a side-wind."

In that same case, Montague Smith, J. said at page 688,

"... 'But, in such an action, it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be, that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause.' The only ground upon which Mr. Wood has attempted to distinguish this case from the current of authorities is, that here the plaintiff had no opportunity of appealing against the conviction. If we yielded to his argument, we should be constituting ourselves a court of appeal in a matter in which the legislature has thought fit to declare that there shall be no appeal. It was intended that the decision of the magistrate in a case of this sort should be final. It cannot be impeached in an action."

Counsel for the plaintiff argued and advanced many grounds why he thought that the plaintiff ought not to have been prosecuted and convicted in the Kadi's Court. I do not think it right for me to consider and make an order whether the prosecution and conviction of the plaintiff was proper and in accordance with law and also the other orders prayed for, because to do so now would mean turning the High Court into an Appeal Court when section 26 of the Enactment, provides that an appeal from the decision of a Kadi's Court lies to the Syariah Appeal Court.

Counsel for the plaintiff referred me to section 25 of the Enactment. Section 25(4) of the Enactment states:–

"(4) Nothing in this Enactment contained shall affect the jurisdiction of any Civil Court and, in the event of any difference or conflict arising between the decision of a Court of the Chief Kadzi or a Kadzi and the decision of a Civil Court acting within its jurisdiction, the decision of the Civil Court shall prevail."

I think what sub-section (4) of section 25 of the Enactment means is that where the same matter is within the jurisdiction of the Kadi's Court and that of a Civil Courts to try, and two conflicting decisions are made, then the decision of this Civil Court shall prevail. The case before me is not one where the matter is triable both by the High Court and the Kadi's Court.

Counsel for plaintiff also submitted that the Kadi did not know English and, therefore, he could not understand the provisions of the Enactment which was written in English. He alleged that the Kadi was administering the law in ignorance, and had to rely on the law as translated to him, or to rely on the unlawful translation (into Malay) of the English text. At para 15 of the Statement of Claim, it is alleged that the Kadi was therefore not competent to hear the plaintiff's case.

I note that under section 22 of the Enactment, suitable persons may be appointed by the Sultan as Kadis, and that under section 25(2) of the Enactment, a Kadi is competent to try a criminal case punishable with imprisonment not exceeding one month. An offence under section 149 of the Enactment carries a maximum penalty of one month's imprisonment. I think the competency or otherwise of the Kadi to hear the criminal case against the plaintiff, and all the other points raised in the submission by the plaintiff's counsel are points which properly should be submitted for consideration by the Syariah Appeal Court at the hearing of the plaintiff's appeal there. I am also of the view that since the criminal proceedings against the plaintiff in the Kadi's Court has not been finally determined by the Syariah Appeal Court in the plaintiff's favour, it is premature for the plaintiff to bring this action.

I am, therefore, satisfied that the plaintiff's Statement of Claim discloses no reasonable cause of action against the three defendants, and I order that it be struck out with costs.

Claim Struck Out.

Solicitors: *Wan Abdul Muttalib & Co.*

BRUNEI REPORTS

HAJI MATUSSIN BIN PENGARAH RAHMAN v. HAJJAH TAMPOI BTE. HAJI MATUSSIN & ORS.

[C.A. (Briggs P., Leonard & Kempster CC.) May 21, 1983]
[Bandar Seri Begawan – Civil Appeal No. 4 of 1982]

Land Law – Adverse possession alleged since 1964 – Whether said claim could survive repeal of Limitation of Suits Enactment 1918 – Whether subsequent Limitation Enactment 1962 of retrospective effect – Limitation Enactment 1962, ss. 3, 13 & 26; arts. 110 & 112 – Limitation of Suits Enactment, 1918, s. 3(g) – Land Code (Cap. 40), ss. 9(1), 27, 28(3) & 29.

Limitation – Effect of repeal of Limitation of Suits Enactment on claim of adverse possession since 1964 – Whether subsequent Limitation Enactment 1962 of retrospective effect.

The question posed before the court in this case was, "Did the right of the defendant to seek the exercise of the court's discretion in his favour so as to dismiss a claim by the plaintiffs for possession, having regard to this alleged and admitted adverse possession since 1964, survive the repeal of the Limitation of Suits Enactment?"

Held: (1) section 13 of the Limitation Enactment 1962 suggests overwhelmingly that the Limitation Enactment 1962 had retrospective effect;

(2) the defendant had an accrued and surviving right to seek the court's discretion under the Limitation of Suits Enactment 1918; a right expressly preserved by Section 10(c) and (e) of the Interpretation and General Clauses Enactment 1959. Such a right is not to be taken away by refusing a retrospective operation to the repealing statute unless such a construction is unavoidable;

(3) in the premises the plaintiffs' titles were extinguished pursuant to section 26 of the Limitation Enactment 1962 and the defendant/appellant succeeds as against the plaintiffs both on the claim and counterclaim.

Case referred to:

(1) *Yew Bon Tew* v. *Kenderaan Bas Mara* [1982] 3 All E.R. 833, 839; [1983] 1 M.L.J., P.C.

COURT OF APPEAL.

F.S. Choo for the appellant.
Ian Bond for the respondent.

Cur. Adv. Vult.

Kempster C.: In these proceedings both plaintiffs and defendant appealed from a judgment of Mr. Commissioner Jones given on August 4, 1982 whereby he made an order for possession of land known as Lot 218 in the district of Brunei in the plaintiffs' favour. In the course of the hearing of the action and of this appeal a number of questions relating to the Land Law of the State have, we are told, been argued for the first time.